

#17-79

Comments on FCC's Non-compliant Towers Discussion Meeting
Isleta Resort and Casino, Albuquerque, NM, January 27-28, 2016

Accepted / Filed

MAR 30 2017

By Jennifer Sigler
Tribal Archaeologist, Eastern Shawnee Tribe of Oklahoma
February 12, 2016

Federal Communications Commission
Office of the Secretary

I appreciated the opportunity to hear multiple perspectives on the non-compliant tower issue, including representatives from the many tribes, SHPO offices, the FCC, cell tower companies, and the cell tower industry trade association who were present. In response to the request for comments from the attendees, I have summarized my thoughts on the meeting's discussions and proposed solutions.

"Twilight towers" vs. "non-compliant towers": this is more important than just an argument about semantics.

DOCKET FILE COPY ORIGINAL

The first thing to point out is that there was not even a consensus regarding which towers should have been the subject of this meeting. The cell tower industry representatives (reps from various cell tower companies and CTIA/PCIA, among others) only wanted to focus on "twilight towers", while the FCC agenda and discussion topics document refer to "non-compliant towers". Most (possibly all) of the tribal reps present at the meeting expressed the opinion that to them, there is essentially no difference between twilight towers and non-compliant towers; if any towers were built without going through the Section 106 review process, for whatever reason, that is a problem that needs to be addressed.

I feel that the tribes would be more conducive to working towards a solution if the industry reps did not repeatedly voice the attorney-approved party line about how these towers are not non-compliant and that their existence is just a reflection of the lack of clarity in FCC regulations at the time. This may be true, but this emphasis makes it seem like the cell tower companies are anticipating trying to avoid making amends and mitigating damages caused by these towers. It also implies that they will not commit to reviewing all of the towers, but instead only ones that companies want to collocate on.

Cell tower companies and CTIA/PCIA assert that we have to understand the "muddled" regulatory context in which these towers were built, and I understand that the process has evolved and been made more explicit thanks to the TCNS system and the Programmatic Agreement that went into effect early in 2005. However, Section 106 was not new legislation in 2001, and there is certainly the appearance that at least some cell tower companies used the regulatory confusion to their advantage. If you were building cell towers, even in the late 1990s and early 2000s (and certainly by the time of the Western Wireless lawsuit involving the Medora, North Dakota tower in 2003), you had to know that cell towers could and did negatively impact historic properties, and that there could be consequences for failing to properly consider a tower's impact on historic properties.

The issue for those of us concerned about cultural sites is this: there were towers built without proper review that did, and still do, adversely affect sites of historic and/or tribal significance. We want to know about all of them, no matter what you call them. I imagine the issue of their legality regarding the appropriate pre-construction environmental review process would have to be settled in

court, and it might be less costly in the long run (and provide better returns in terms of good will and cooperation) for the companies to take responsibility now and commit to finding a solution that we can all live with.

The scope of the problem has not been defined, which makes it impossible to accurately assess the potential scope of the solution.

A big issue was made out of the fact that the cell tower companies did not come to the meeting knowing how many twilight towers there are, or where they are located. I appreciate their explanation as to why this was so, and that also helped me understand their business a little better. However, they have to understand that it is hard for tribes and SHPOs to provide much information regarding how long these reviews will take when we don't know how many reviews we will have to do, where they will be located, or what tribes and states will be affected. It is not acceptable to be discussing a timeline for the tribes and SHPOs to get the towers reviewed without first having the cell tower companies agree to a timeline to identify the number and location of the towers.

Furthermore, the cell tower companies need to understand that not every review of every tower is the same. Asking how long it takes to review a tower is like asking how long a string is. It depends! Multiple tribal representatives implored the industry to try to see the tribal perspective on these towers. Where cell tower companies see profit, tribes see their history and culture. The CTIA/PCIA does not want the reviews of these towers to be "too burdensome", and they want them to be "expeditious", but the tribes are more concerned about doing these reviews thoroughly and accurately. It is also important that a precedent is not set whereby it gives companies the impression that it is easier to ask forgiveness than permission, as the saying goes.

One thing that really stood out to me was a bullet point in the CTIA/PCIA presentation describing what they thought a solution should do; it said that a solution "must address actual findings of objective adverse effects." What does that even mean, "objective adverse effects"? I'm not sure there is such a thing. Different people, different cultures, and different tribes have different values, and all cultural sites are not the same. "Adverse effects" has to be defined by the people affected, and to think that there is some objective measure of that is simply nonsense. How do you measure the value of quiet at a tribe's sacred place? How do you measure the value of the unobscured landscape from a sacred mountaintop? How do you measure the degree to which an intrusive cell tower negatively impacts the setting, feeling, and association of a historic district? To try to discount a tower's impacts because they cannot be "objectively" measured is outrageous.

We need to develop a process to conduct retroactive reviews on already-built towers that accurately assesses a tower's impacts on cultural resources, and we need all parties involved to agree that any adverse effects will be mitigated. This could include, in some extreme cases, tower removal.

As a person who will be responsible for reviewing these reports for a tribe, I feel that the only acceptable solution would involve a case-by-case review of each tower. This must involve field survey when necessary, and the preparation of a report including the results of the field survey as well as background research. The submission packet should contain the same information that is contained in any other new-

build cell tower project packet. The existing TCNS system seems an appropriate mechanism for identifying interested parties and carrying out the process.

All of the towers need to be reviewed, not just ones on which companies want to collocate (though it sounded like, from what cell tower company reps said at the meeting, that the latter category would eventually subsume the former). When these get done is another matter; from a reviewer's standpoint, it would not be possible to review large numbers of these in a short period of time with the existing staff. This is where having a good handle on the number and location of the twilight towers would be useful, because we could better assess our resource needs to meet the increased review workload.

It will not be acceptable to forgo a field survey due to previous disturbance caused by the building of the original tower. The survey must include shovel tests in the tower vicinity, when practicable, and must include enough of the area surrounding the tower to reasonably extrapolate if the tower's construction likely disturbed any cultural resources. As others pointed out at the meeting, the absence of previously recorded sites is not necessarily any indication of what is actually there, since the vast majority of projects are in areas that have never undergone an archaeological survey. Even if areas have been surveyed, if the information is incomplete or outdated, a new survey may still be necessary. It must also be remembered that archaeologists are not trained to recognize all of the types of sites that are important to tribes.

Pilar Cannizzaro of the New Mexico Historic Preservation Division had some useful case studies about retroactively reviewing towers. She had specific examples of how projects submitted by out-of-state companies complicated the review process due to their unfamiliarity with regional resources and inadequate documentation. It made it take longer for her to get the information she needed, with the work eventually being done by a different company that was familiar with the resources of the areas in question. While most of the towers had no adverse effect, the three that did have adverse effects took a relatively long time to be mitigated. Because of the unique characteristics of the sites affected, and the fact that already-built towers require different kinds of mitigation, they had to get creative in tailoring solutions for each tower. This is something we need to keep in mind when we are thinking about how we will mitigate adverse effects. You cannot mitigate damages to a segment of Route 66 the same way you mitigate damages to a sacred pueblo, for example. I am not sure it is possible to have an effective "blanket mitigation" strategy, as was suggested.

This also brought up another sore spot for me as a reviewer, and that is how often I see cell tower companies trying to save money by hiring the cheapest archaeological consultant they can find. Don't they wonder how come some companies can do the job so much more cheaply than others? Cell tower projects are small and statistically speaking, it's not unusual that many are built in areas where there are no cultural sites. However, it cannot possibly be only a coincidence that there are certain companies who never, ever find archaeological sites in cell tower pads. Just this week I reviewed a project where two surveys were done of the exact same project area, only a few months apart. The first company found nothing, but the second found an archaeological site. How do you miss an archaeological site in a 100 x 100 ft cell tower lease compound, when another company easily finds it just two months later? I have also heard from friends in the consulting business who talk about getting pressure to overlook cultural sites, to the extent that some have not gotten rehired after projects where they've found a site. This problem

obviously goes way beyond twilight towers, or even cell towers, but I cannot stress enough that in doing these retroactive reviews, companies must hire qualified and competent cultural resource consultants.

Please don't let this turn into another PTC Program Comment.

There are several aspects of the PTC Program Comment that are not favorable to cultural resource management, and I hope that we have learned what does and does not work based on the collective experience with the PTC Program Comment. A main concern is the PC's assumption that since something may have already been damaged by one construction episode, an additional construction episode can't cause additional damage. This is absolutely not the case. Intact, significant cultural resources can and do exist in seemingly very disturbed locales. This assumption is even worse when paired with its usual corresponding, inaccurate second assumption, which is that if no historic properties have already been recorded in a certain area, there is nothing there. Together, these two assumptions can have alarming consequences on cultural resources. For a recent example (though not associated with a cell tower), look at Silver Spring, Maryland, where developers had begun tearing down a seemingly nondescript stone house at a used car lot. That building ended up being the 1780 James Bell Tavern, significant for its association with Anti-Federalist meetings that led to the creation of the Bill of Rights. Another recent (though again, not cell tower-related) occurrence involved a mammoth bone found under the end zone of the Oregon State University football stadium. I cannot stress enough that companies need to stop discounting the potential for important things to be located in unexpected areas.

Another concern is that an expedited comment period will be pushed on the reviewers, with no consideration for additional time needed for additional information requests. I myself have experienced, and know others who have as well, getting stonewalled on my additional information requests until the comment period expires. It needs to be explicitly stated that a reviewer's comment period cannot expire while they are waiting for additional information that they have requested.

Summary

I appreciated the opportunity that the meeting presented for all sides to voice concerns, listen to others' perspectives, and begin to discuss avenues for resolution. I, for one, learned a good deal about the cell tower building and acquisition process from the industry representatives. I also learned from hearing about fellow tribal reviewers' concerns, and from the experiences of the state historic preservation officers. I hope that we are able to balance the multiple and sometimes opposing needs of various entities and find an agreeable solution.